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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOSE INFANZON,

Appellant,

v.

ANA MARIA JIMENEZ CARDENAZ,

Respondent.

D054727

(Super. Ct. No. DN142198)

APPEAL from a judgment of the Superior Court of San Diego County, Harry L. Powazek, Judge. Affirmed.

I

INTRODUCTION

Jose Infanzon appeals from a judgment of the trial court in which the court made a final determination of custody of his three children, and ordered that his ex-wife, Ana

Maria Jimenez Cardenaz,¹ be permitted to move to Guadalajara, Mexico with the children.

On appeal, Jose contends that the trial court abused its discretion in denying his request for a continuance of the hearing on the custody issue and Ana's move-away request. Jose had requested a continuance because the expert whom the court appointed under Evidence Code section 730 to offer recommendations to the court regarding custody, would be unavailable to testify at the hearing. Prior to receiving a summons to appear, the expert had made vacation plans and would be out of the country at the time of the hearing. According to Jose, he was denied a meaningful hearing because rather than having the expert testify in court, the court allowed in evidence the expert's report and the transcript of her deposition testimony. Jose maintains that as a result of proceeding in this manner, the court was unable to judge the expert's credibility.

Jose also contends that there is insufficient evidence to support the trial court's determination that it would be in the children's best interests to allow them to move to Mexico with Ana.

We conclude that Jose was not denied a meaningful hearing as a result of the court utilizing the expert's report and deposition testimony rather than live testimony, and therefore conclude that the trial court did not abuse its discretion in denying Jose's request to continue the hearing due to the expert's unavailability. We further conclude that there is substantial evidence to support the trial court's conclusion that permitting the

¹ We use the parties' first names for purposes of clarity, and intend no disrespect.

children to move to Mexico with Ana would be in their best interests. We therefore affirm the judgment of the trial court.

II

FACTUAL AND PROCEDURAL BACKGROUND

Ana and Jose married in 2001 in Guadalajara, Mexico. The couple lived in Guadalajara for a year and a half and then moved to La Jolla, California. The couple's three children, R., J., and S., are all United States citizens. At the time of the proceedings in the trial court, R. was six years old, J. was four years old, and S. was three years old.

On June 15, 2006, Jose filed for legal separation from Ana, and sought an injunction preventing Ana from "removing the minor children from the State of California." Jose also filed an order to show cause (OSC) seeking an order granting him legal and physical custody of the children.

In October 2006, Jose and Ana participated in a mediation at which they reached a partial agreement as to a plan for sharing custody of the children, as evidenced in a recommendation report by Family Court Services (FCS). In November 2006, the court issued a temporary order adopting the recommendation of FCS. Pursuant to the recommendations, the parties were to share legal and physical custody of the children in the United States, with Ana having primary physical custody of the children. Ana was given approximately a 72 percent timeshare, and Jose was given approximately a 28 percent timeshare.

In June 2007, Ana moved for an order dismissing the case on the ground that California was an inconvenient forum. In the alternative, Ana requested a modification

of the custody order to permit her to move to Guadalajara, Mexico with the children.

Ana also sought child support and spousal support, as well as attorney fees. Jose opposed Ana's motion. The parties participated in another mediation at FCS in August 2007. The FCS report that was prepared after this mediation recommended that the parties continue to share legal and physical custody, but contained an adjustment giving Ana approximately a 60 percent timeshare and Jose approximately a 40 percent timeshare.

On October 3, 2007, the trial court determined that it had jurisdiction over the children, but that property issues between the parties would "be dealt with in Mexico." After the court indicated that it had asked the parties' attorneys to meet and confer regarding the appointment of an Evidence Code section 730 expert, Ana's attorney responded, "Our recommendation, [Y]our Honor, if you're going to go that way, is either Beatrice Heller or Karen—and I don't remember—Olmstead" After denying Ana's request that it decline to exercise jurisdiction over the matter on the ground of inconvenient forum, the court indicated that it would consider Ana's request return to Mexico to be a "move-away" request, and ordered the parties to select an evaluator.

On October 19, Jose sought to have the court appoint Dr. David Green as the court's Evidence Code section 730 expert, despite the fact that Dr. Green was not bilingual—a factor that was of great importance to Ana. Jose's attorney suggested that Dr. Heller was inexperienced, citing the fact that Dr. Heller "was unknown to any of the local attorneys that [she] discussed this situation with." The record does not contain the court's ruling with respect to Jose's request that it appoint Dr. Green as the Evidence

Code section 730 expert. However, in later documents, the court referred to Dr. Heller as the court-appointed Evidence Code section 730 expert.

On November 30, 2007, the trial court held a hearing on Ana's June 8 motion. The court adopted the recommendations as to custody in the August 2007 FCS report as an interim order "while the 'move-away evaluation' [was] conducted."

In March 2008, Dr. Heller completed her "Report of Psychological Evaluation." The following month, Jose requested an evidentiary hearing on Ana's move-away request. The hearing was set for August 28, 2008.

On May 20, 2008, Jose subpoenaed Dr. Heller for a June 26, 2008 deposition and for the August 28 hearing. That same day, Dr. Heller telephoned Jose's attorney and "left a message at her office informing [her that she] would be available for the June 26, 2008 deposition, but would be out of the country on vacation during the [evidentiary hearing], and that the vacation was already set and paid for."

Jose's attorney took Dr. Heller's deposition on June 26, 2008. At the conclusion of the deposition, Dr. Heller again stated that she would be unavailable on the date on which the evidentiary hearing was set. She affirmed that she had previously left a message at Jose's attorney's office informing the attorney that she would not be available for the hearing:

"MS. TRUCCHI: Okay. All right, I'm going to mark these two subpoenas, then, as next in order, which will be F and G, and they're for a hearing in July. I don't – a hearing in July and then a trial in August.

"[¶]. . . [¶]

"[DR. HELLER]: When in August?

"MS. TRUCCHI: August 28th or 29th.

"[DR. HELLER]: Okay. Your office had sent me a subpoena. I called back immediately indicating that I would be out of the country. I called back the same day I received the subpoena via fax [to say] that I will be out of the country for those dates and that I won't be able to comply.

"MS. TRUCCHI: I didn't realize that. I don't know. I guess I didn't get that message. Well, okay, we'll have to figure out what to do about that.

"[DR. HELLER]: For your information I'll be out of the country between August the 19th and September 8th."

On July 16, Jose asked the court to continue the August 28 evidentiary hearing date because Dr. Heller would not be available. The court held a hearing on Jose's request for a continuance that day. The court noted that the court's calendar was extremely tight and that Jose was making the request late in the process. The court gave Jose two options—to move forward on the scheduled hearing date without Dr. Heller's live testimony and "proceed with whatever remedies [he] would like," or, if the court continued the hearing, the court would permit Ana and the children to go to Mexico on an interim basis until Dr. Heller was available to testify.

Jose elected to proceed with the hearing on the previously scheduled August hearing date.

On August 15, Jose filed a trial brief in which he again requested a continuance of the hearing, and also objected to the introduction of Dr. Heller's ultimate conclusion

regarding Ana's request for a move-away order.² Despite this objection, Jose relied on Dr. Heller's deposition testimony throughout his trial brief.

The trial court held the evidentiary hearing on August 28 and 29, 2008. At the hearing, the court admitted the entirety of Dr. Heller's deposition transcript. The court also heard testimony from Jose, Ana, Ana's mother, a woman who helped Jose and Ana with housekeeping, and Dr. Green, whom Jose hired to testify as an expert. Ana testified that from the time the children were born until the date of the hearing, she had provided most of their care. For example, she was the one who had changed their diapers and brushed their teeth.³ Ana was also the one who gave the children medicine when they were sick and who read to them, teaching them both English and Spanish. Ana was the parent who usually bought the children's clothing, and arranged for their haircuts, and took the children to the doctor when they got sick. Ana researched the children's schools, attended their parent-teacher conferences, and knew the children's teachers.

Jose testified that he had observed Ana being physically aggressive with the children, in that she "yells at them a lot," "spanks them," and "pinches them." At one point when Jose and Ana were not getting along and were having financial difficulties, Ana took the children to Guadalajara and indicated to Jose that she planned to stay in

² There is nothing in the record indicating whether the trial court ruled on the issues raised in Jose's trial brief. However, one can infer from the court's later actions that the court implicitly denied the request for a continuance and overruled the objection to Dr. Heller's conclusions about the move-away request.

³ Jose's attorney objected to some of Ana's attorney's questions surrounding these topics as "leading" and "[m]ove[d] to strike leading questions." The court sustained the objection. However, it is unclear from the record which questions the court struck.

Mexico with the children, telling him "that she was going to determine how and where she and [the] children were going to live." When Ana returned, Jose had her served with an order prohibiting her from taking the children out of California.

In an attempt to reconcile with Ana, Jose entered a rehabilitation facility for an "alcohol problem." He completed a program at a facility in Jalisco, Mexico in October 2006. In September 2007, Ana had the children "registered" in Mexico, which, according to Jose, was an attempt "to make [the children] Mexican citizens." Ana did this without Jose's consent.

Dr. Green testified that he had reviewed Dr. Heller's report and "more specifically [her file] dealing with the psychological testing data." Dr. Green had not personally observed or interviewed Jose, Ana, or the children, and relied solely on Dr. Heller's observations in formulating his opinions. Dr. Green testified that the results of a psychological test Dr. Heller had conducted favored giving custody to Jose rather than Ana.

At the conclusion of the hearing, the trial court informed the parties that the court would consider the "substantial amount of evidence presented," and would not make any findings that day. The court indicated that it expected to provide the parties with an order within 30 to 60 days.

By letter dated November 7, 2008, the trial court issued its findings, determining that it would be in the children's best interests to grant Ana's request to move with the children to Mexico "at the end of the current school year." The court stayed the order for 30 days from the entry of judgment. The court requested that Ana's attorney prepare a

"Proposed Order After Hearing and Statement of Decision pursuant to the terms as set forth herein"

Ana's attorney submitted a document that tracked the substance of the trial court's November 7, 2008 letter. On January 7, 2009, the court signed and filed this statement of decision.

On January 23, the court filed a document entitled "Order after Hearing." In this order, the court indicated that counsel for the parties had been "unable to agree on the language of the ruling," leaving it to the court to "issue[] its ruling on aforementioned issues." The court entered judgment on February 5, 2009.

On March 6, Jose filed a motion to stay the order permitting the children to move to Mexico with Ana.

On March 9, 2009, Jose filed an amended notice of appeal from the trial court's January order.⁴

The trial court held a hearing on Jose's request for a stay on May 5. Although the record on appeal does not contain the court's ruling, Jose states in his opening brief that the trial court denied the request.

Jose filed a petition for a writ of supersedeas in this court on June 5. This court denied Jose's petition on June 25.

⁴ The record does not contain the original notice of appeal.

III

DISCUSSION

A. *The trial court did not abuse its discretion in denying Jose's request to continue the evidentiary hearing*

Jose challenges the trial court's order denying his request for a continuance. Jose contends that the trial court violated his rights in relying on Dr. Heller's deposition testimony, rather than her live testimony.

Jose requested a continuance on July 16, approximately six weeks before the August 28 hearing date, which had been scheduled months in advance. The trial court indicated that its calendar was "incredibly impacted," and that if Jose had requested a continuance three weeks earlier, when everyone was clearly aware that Dr. Heller had a scheduling conflict, there "may have been something [the court] could have done." Jose's attorney stated that she had been under the impression that the week during which the hearing was set was the only week the trial court had available during the "whole summer," and she did not "think there was a chance of getting in earlier." The court responded that it could have made arrangements to hold the hearing on two separate days rather than two consecutive days, to accommodate the witnesses' schedules. In light of the circumstances, the court told Jose's attorney, "[Y]our client has an option. You need to give me an idea of what he wants to do. I'll do one of two things: I'll continue the trial. But if I do that, then I'm going to adopt the recommendations as an interim order of the Court. If not, we will go forward as scheduled." The court continued, "My concern is that it was adequate time to deal with Dr. Heller's unavailability. Coming in three

weeks down the line, a month down the line, and then saying you need to do something about -- [¶] . . . [¶] . . . If this was something where you found out yesterday or a week ago that Dr. Heller was not available, I would continue it in a heartbeat, but that's not the case here."

In response to Jose's attorney's contention that Jose was "entitled to have [Dr. Heller] testify," the court said, "You do have that right. [¶] But sitting on this case, waiting for three to four weeks later, on the -- not on the eve of trial, but pretty close to it--and not giving the Court an option to try to reschedule something is not appropriate." The court noted that the trial date had been set as of April 29, and that Jose's attorney had known about the conflict in Dr. Heller's schedule as of June 26, at the latest. Ana's attorney also pointed out that Dr. Heller stated in her declaration that she had left a message for Jose's attorney about her unavailability for the August hearing date on May 20. Jose's attorney indicated that she had received a message that said only that Dr. Heller would be available for the deposition. The following exchange then occurred:

"THE COURT: Those are your options, Ms. Trucchi. Either it goes forward without Dr. Heller and you could proceed with whatever remedies you would like, or I will continue the trial and allow the children to move, without prejudice, pending the hearing date when you could have Dr. Heller available.

"MS. TRUCCHI: Well, okay. Again, [Y]our Honor, I guess without stipulating and/or waiving any rights that we have to live testimony from the 730 expert providing the recommendation, I guess we will go with Box B, not continuing--or proceeding in August--

"THE COURT: Okay.

"MS. TRUCCHI: --without Dr. Heller."

Jose challenges the court's denial of his request to continue the hearing. Jose appears to concede that the court's decision to deny his request for a continuance was a matter of discretion, and that this court should review the trial court's decision not to continue the hearing for an abuse of discretion. We agree: "Continuances are granted only on an affirmative showing of good cause requiring a continuance. [Citations.]" (*In re Marriage of Falcone & Fyke* (2008) 164 Cal.App.4th 814, 823.) A trial court's decision not to grant a continuance is typically reviewed for an abuse of discretion. (*Ibid.*)

Jose suggests that by not continuing the matter, the trial court deprived him, and the children, of a meaningful hearing because the court was not able to judge Dr. Heller's veracity and sincerity before relying on her expert opinions. Jose cites *Elkins v. Superior Court* (2007) 41 Cal.4th 1337 (*Elkins*) and *In re Marriage of Seagondollar* (2006) 139 Cal.App.4th 1116 (*Seagondollar*) in support of his position. However, the circumstances of those cases were significantly different from the circumstances of this case, and neither indicates that the trial court in this case abused its discretion in declining to grant a continuance.

Elkins involved a challenge to a local court rule and trial scheduling order in the family court that "provided that in dissolution trials, parties must present their cases by means of written declarations." (*Elkins, supra*, 41 Cal.4th at p. 1344.) Under the rule and scheduling order, "The testimony of witnesses under direct examination was not allowed except in 'unusual circumstances,' although upon request parties were permitted to cross-examine declarants. In addition, parties were required to establish in their

pretrial declarations the admissibility of all exhibits they sought to introduce at trial."

(*Ibid.*)

The Supreme Court determined that "the rule and order are inconsistent with various statutory provisions," explaining:

"[W]e reach this conclusion because, pursuant to state law, marital dissolution trials proceed under the same general rules of procedure that govern other civil trials. Written testimony in the form of a declaration constitutes hearsay and is subject to statutory provisions governing the introduction of such evidence. Our interpretation of the hearsay rule is consistent with various statutes affording litigants a 'day in court,' including the opportunity to present all relevant, competent evidence on material issues, ordinarily through the oral testimony of witnesses testifying in the presence of the trier of fact." (*Elkins, supra*, 41 Cal.4th at p. 1345 (fn. omitted).)⁵

The *Elkins* court stated that "*ordinarily*" a litigant is afforded the opportunity to present all relevant competent evidence "through the oral testimony of witnesses." (*Elkins, supra*, 41 Cal.4th at p. 1345, italics added.) This statement leaves open the possibility that there may be instances in which a party may not be afforded the opportunity to elicit live testimony from a witness. Further, unlike the situation in *Elkins*, which involved parties attempting to litigate their positions solely through the use of declarations, Jose had the opportunity to pose questions to Dr. Heller during her deposition, and the deposition transcript was admitted in evidence and considered by the court.

⁵ The *Elkins* court noted, however, that its holding "does not affect hearings on motions." (*Elkins, supra*, 41 Cal.4th at p. 1345, fn. 1.)

In contrast with the local rules that were at issue in *Elkins*—rules that the Supreme Court determined were inconsistent with state statutes—the trial court's ruling in this case was consistent with the Evidence Code, which makes the former testimony of an unavailable witness admissible in certain circumstances, despite the hearsay rule, including situations in which "[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an interest and motive similar to that which he has at the hearing." (Evid. Code, § 1291, subd. (a)(2).) Jose had the opportunity to question Dr. Heller during her deposition, and his interests were the same at the deposition and at the evidentiary hearing.⁶

The *Elkins* court was predominantly concerned with the fact that the local rule precluded the parties in a family court case from being able to tell their own stories to the judge, creating a sense that a "lesser standard of justice" applied to family law litigants. (*Elkins, supra*, 41 Cal.4th at p. 1367 ["We are most disturbed by the possible effect the rule and order have had in diminishing litigants' respect for and trust in the legal system. The Contra Costa survey confirmed that litigants believed the rule and order deprived them of the essential opportunity to 'tell their story' and 'have their day in court,' and felt the rule and order caused the lawyers who drafted the declarations to be the persons testifying, not themselves."].) No similar concern is raised by the manner in which the

⁶ Jose does not contend that Dr. Heller should not have been considered " 'unavailable' " for purposes of the admission of her prior testimony within the meaning of Evidence Code section 240, subdivision (a)(5).

trial court proceeded in this case, since both Ana and Jose were given the opportunity to testify and to tell their own stories to the court. In addition, both were permitted to hire experts to present testimony to support their positions. Jose took advantage of this opportunity, calling Dr. Green to testify as an expert. Although the trial court's utilization of, and reliance on, Dr. Heller's report and deposition testimony, rather than her live testimony, was not ideal, it did not render the hearing meaningless or suggest to the parties that a "lesser standard of justice" applied to their case. (*Ibid.*)

Nor does *Seagondollar* provide support for Jose's contention. The court in *Seagondollar* concluded that the trial court had erred in a number of ways, such as in:

"(1) failing to require [the mother] to file a responsive pleading to [the father's] March OSC or to file a counter-OSC requesting custody and a move-away; (2) granting [the mother]'s request to hear her October OSC on shortened notice without good cause; (3) refusing to hear [the father]'s motion to quash before the hearing on [the mothers]'s October OSC; (4) refusing to trail or continue the matter for three days to permit [the father]'s rebuttal expert to testify; and (5) failing to issue an order defining in detail the purpose and scope of the Evidence Code section 730 evaluation." (*Seagondollar, supra*, 139 Cal.App.4th at p. 1127.)

In these circumstances, the *Seagondollar* court concluded that the "*cumulative effect*" of the trial court's errors "was to deny [the father] a fair hearing." (*Seagondollar, supra*, 139 Cal.App.4th at p. 1127, italics added.) Only one of the errors about which the father complained was the court's refusal to continue the hearing for three days in order to allow the father's rebuttal expert to testify. That, alone, distinguishes *Seagondollar* from this case, in which the only procedural complaint that Jose raises is the trial court's

refusal to continue the hearing. There are additional reasons why *Seagondollar* is distinguishable from this case. First, Dr. Heller was not an expert for either party, but rather, was an expert appointed by the court. Evidence Code section 730 authorizes the appointment of experts "to investigate, to render a report as may be ordered by the court, and to testify as an expert at the trial of the action" when it appears to the court that "expert evidence is or may be required by the court or by any party to the action." The trial court is not obliged to appoint an expert to assist it in making a factual determination (*In re Eric A.* (1999) 73 Cal.App.4th 1390, 1394, fn. 4), and it is within the trial court's discretion to determine whether an expert is needed (*Collins v. Superior Court* (1977) 74 Cal.App.3d 47, 52). Here, the trial court exercised that discretion to appoint Dr. Heller, whose role was that of a neutral observer of the parties and the children. There is nothing in Dr. Heller's report that indicates that she favored one parent over the other. In fact, Dr. Heller noted how difficult it was for her to make a recommendation in this case because there was not an obvious answer to the question of what would be in the children's best interests.

Further, in *Seagondollar*, the father had asked "for a short continuance" to accommodate his expert's schedule, only "after the court had accommodated [the mother's] expert witness," and after the court had permitted the mother's OSC to be heard on shortened notice without good cause, and in the absence of sufficient proof that the OSC had been properly served on the father. (*Id.* at pp. 1130-1132.) The *Seagondollar* court questioned the trial court's handling of all of these matters, stating, "In the brief time between [the mother]'s filing the October OSC and the hearing, [the father] retained

Dr. Stahl as a rebuttal witness to Dr. Adam. As [the father] explains, on October 13, 2004, the trial court reset the hearing on [the mother]'s October OSC in deference to Dr. Adam's schedule. We do not understand why the trial court did not similarly accommodate Dr. Stahl by permitting a three-day continuance." (*Id.* at p. 1131.)

In the present case, the hearing date had been set for a number of months, and unlike the situation in *Seagondollar*, the court did not accommodate one party's witness, while refusing to accommodate the other party's witness. In addition, the trial court's schedule was full for the foreseeable future, making it virtually impossible for the court to grant a "short" continuance. Further, Jose waited a number of weeks after hearing of Dr. Heller's conflict before he sought a continuance, thereby making it even more difficult for the court to come up with a workable solution to the problem. The trial court offered Jose two reasonable options, taking into consideration the various interests to be accommodated. Jose chose the option that meant that both he and Ana would have to rely on Dr. Heller's deposition testimony. For all of these reasons, we conclude that the trial court's denial of Jose's request for a continuance was not akin to the rulings challenged in *Elkins* and *Seagondollar*, and did not deny Jose a meaningful hearing.

Jose further contends that because the trial court did not "allow testimony from the key witness and instead relies upon a deposition transcript," the court did not have the opportunity to judge the credibility of Dr. Heller. Jose maintains that proceeding in this manner rendered the hearing not meaningful. Jose cites *In re Marriage of Everett* (1990) 220 Cal.App.3d 846 in support of this argument. However, *In re Marriage of Everett* states simply that an appellate court "must respect the judge's credibility calls." (*Id.* at

p. 861.) Here, the trial court implicitly determined that Dr. Heller was credible, and that her observations and recommendations were trustworthy. The court had available to it Dr. Heller's deposition testimony, in which she was questioned by both parties' attorneys. The court was thus able to see how Dr. Heller responded to inquiries about her conclusions, and could form an opinion as to Dr. Heller's credibility, despite not seeing her testify live. Again, Dr. Heller was a neutral expert who did not have a personal interest in the outcome of this case. In such a circumstance, the trial court's decision to rely on Dr. Heller's deposition testimony rather than to postpone the hearing in order to have her testify live cannot be said to constitute an abuse of discretion.

Finally, Jose has not demonstrated that he was prejudiced by the trial court not observing Dr. Heller testify live. He does not argue that Dr. Heller's live testimony might have differed from her deposition testimony, or that any particular part of her testimony lacked credibility. Jose does suggest on appeal that he believes Dr. Heller "lacked credibility and sincerity." However, apart from these vague assertions, Jose does not point to any portion of Dr. Heller's report or deposition testimony that he maintains should not have been given weight or was particularly suspect. Further, Jose has offered nothing that would suggest that Dr. Heller was biased against him, or that the trial court had any reason not to trust Dr. Heller's testimony. To the extent that Jose contends that Dr. Heller's credibility was in question, we note that Jose, himself, relied on a number of Dr. Heller's conclusions and observations, and in fact requested that the court admit in evidence various portions of Dr. Heller's deposition testimony in support of his position. Because of this, and because Dr. Heller gave what appears to be an even-handed and fair

evaluation of the parties (and in fact offered a significant number of observations and opinions that favored Jose, and on which Jose himself relied), we conclude that the trial court would not have reached a different conclusion if the court had observed Dr. Heller testify in person.

Jose has not demonstrated that the trial court abused its discretion in declining to grant a continuance, even if that decision meant that the court did not hear live testimony from the court's appointed expert, Dr. Heller.

B. *There is substantial evidence to support the trial court's decision to allow the children to move to Mexico with Ana*

Jose contends that there is not substantial evidence to support the trial court's decision to grant Ana's request to relocate the children to Mexico because, he asserts, Dr. Heller's "stated reasons for recommending that the move away request be granted are not supported by the facts."

This matter was in the trial court for determination of a permanent custody order. Although the trial court had entered previous interim custody orders, there was no final judicial custody determination in place at the time of the hearings. "In an initial custody determination, the trial court has 'the widest discretion to choose a parenting plan that is in the best interest of the child.' [Citation.] It must look to *all the circumstances* bearing on the best interest of the minor child. [Citation.] Family Code section 3011 lists specific factors, 'among others,' that the trial court must consider in determining the 'best interest' of the child in a proceeding to determine custody and visitation: '(a) The health, safety, and welfare of the child. [¶] (b) Any history of abuse by one parent against the

child or against the other parent. . . .[¶] (c) The nature and amount of contact with both parents.' " (*In re Marriage of Burgess* (1996) 13 Cal.4th 25, 31-32 (*Burgess*).)

"In addition, in a matter involving immediate or eventual relocation by one or both parents, the trial court must take into account the presumptive right of a custodial parent to change the residence of the minor children, so long as the removal would not be prejudicial to their rights or welfare. (Fam. Code, § 7501 ['A parent entitled to custody of a child has a right to change the residence of the child, subject to the power of the court to restrain a removal that would prejudice the rights or welfare of the child.'].)" (*Burgess, supra*, 13 Cal.4th at p. 32.) "Accordingly, in considering all the circumstances affecting the 'best interest' of minor children, it may consider any effects of such relocation on their rights or welfare." (*Ibid.*)

However, "[i]n an initial custody determination, a parent seeking to relocate with the minor children bears no burden of establishing that the move is 'necessary.' The trial court must . . . consider, among other factors, the effects of relocation on the "best interest" of the minor children, including the health, safety, and welfare of the children and the nature and amount of contact with both parents. [Citation.]" (*Burgess, supra*, 13 Cal.4th at p. 34.)⁷

"The standard of appellate review of custody and visitation orders is the deferential abuse of discretion test. [Citation.] The precise measure is whether the trial

⁷ Unlike many move-away cases, this case does not involve application of the changed circumstance rule, which applies when a party seeks modification of a permanent custody order. (See *Montenegro v. Diaz* (2001) 26 Cal.4th 249, 257 [changed circumstance rule applies to modifications of final judicial custody determinations].)

court could have reasonably concluded that the order in question advanced the 'best interest' of the child. We are required to uphold the ruling if it is correct on any basis, regardless of whether such basis was actually invoked. [Citation.]" (*Burgess, supra*, 13 Cal.4th at p. 32.)

We see no abuse of discretion in this case. After hearing testimony from both parties, Ana's mother, a housekeeper whom the parties employed, and Jose's expert, and after considering Dr. Heller's report and deposition testimony, the trial court reasonably concluded that it would be in the children's best interests for Jose and Ana to retain joint legal custody, and for Ana to be permitted to move with the children to Guadalajara. The court stated, "The court has considered the issue of detriment caused by the past moves and the proposed future move. Dr. Heller provides information that there will be some [e]ffect/adjustment upon the children should the court grant Respondent's request to relocate to Mexico. However, there is no evidence provided to the court that the adjustment is anything that would not normally occur given the break-up of the family unit and the distance from [Jose]. Dr. Heller clearly states in her report that the children's separation from their primary parent [Ana] is not in their best interest and clearly would be a detriment."

There is substantial evidence supporting the trial court's determination concerning the best interests of the children.⁸ For example, the court concluded that allowing the

⁸ In presenting his argument challenging the sufficiency of the evidence, Jose cites only the evidence that supports his position, essentially ignoring the evidence in the record that supports the trial court's ruling.

children to move with Ana would provide them with the greater degree of "stability and continuity" of care. The evidence demonstrated that Ana had served as the children's primary caretaker, despite the fact that in the months preceding the hearing, Jose and Ana had been sharing physical custody of the children either equally, or with Jose spending slightly more time with the children than Ana. For example, Ana testified that she had been the children's primary caretaker during the marriage, and offered multiple examples of her care giving. In addition, Dr. Heller testified at her deposition that she was recommending that the children be permitted to move with Ana if Ana moved to Mexico "[b]ecause the children have been raised primarily by" Ana. According to Dr. Heller, "The mother is the one that had spent a great deal of--most [time] with them. The second is . . . the fact that the mother is able to be affectionate and to pay attention to the dependency needs. And the third one is that they have--not at a point that they have developed a very--that the relationship with their father has been firmly established."

Dr. Heller focused on the "level of attachment" of the children to each of their parents. In this regard, she found "the children's level of attachment with their mom to be substantially stronger." Dr. Heller observed that the children "were elated" when she asked them if they wanted their mother to join them during a play session. Dr. Heller also opined that Ana "presents as better able at this time to focus on the impact that her own reactions ha[ve] on the children[]," while Jose "shows a greater feeling of having been wronged by [Ana] and a tendency to associate masculinity with control, which makes it difficult for him to separate his feelings and needs from those of his children."

There was also evidence that Jose had previously had problems with alcohol abuse, and that he had physically abused Ana. The court found Ana's allegations of domestic violence to be credible. As the court stated, "There has been substantial and physical violence by [Jose] against [Ana] which has resulted in the police being called on at least two separate occasions." Although Dr. Heller and the trial court both noted that the abuse had not involved the children, a history of abuse by one parent against the other is nevertheless a relevant consideration in making a custody determination, and, indeed, creates a "rebuttable presumption that an award of sole or joint physical or legal custody of a child to a person who has perpetrated domestic violence is detrimental to the best interest of the child" (Fam. Code, § 3044, subd. (a).)

While Dr. Heller acknowledged that a move to Mexico would have some negative impact on the children and their relationship with their father, she determined that there would be a more significant negative impact on them if Ana were to move without them. According to Dr. Heller, "If the children are allowed to move to Mexico with their mother, they will not remain unscathed but a prolonged separation from their mother is likely to leave profound emotional and behavioral scars in the children." Jose contends that he was not able to ask Dr. Heller what would constitute a "prolonged separation," and that it is therefore not clear that a decision not to permit Ana to move with the children to Mexico would necessarily result in a "prolonged separation" from Ana. However, the trial court could have reasonably interpreted Dr. Heller's comments to mean that a move by Ana to Mexico without the children would result in a "prolonged separation" between Ana and the children.

Jose cites *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072 (*LaMusga*) to support his contention that there is insufficient evidence to support the trial court's order. However, *LaMusga* addressed the applicable rules governing move-away requests that require modification of an already final custody determination. Because that is not the situation here, Jose's substantial reliance on *LaMusga* is misplaced. The *LaMusga* court explained that "[a]mong the factors that the court ordinarily should consider when deciding whether to *modify* a custody order in light of the custodial parent's proposal to change the residence of the child are the following: the children's interest in stability and continuity in the custodial arrangement; the distance of the move; the age of the children; the children's relationship with both parents; the relationship between the parents including, but not limited to, their ability to communicate and cooperate effectively and their willingness to put the interests of the children above their individual interests; the wishes of the children if they are mature enough for such an inquiry to be appropriate; the reasons for the proposed move; and the extent to which the parents currently are sharing custody." (*Id.* at p. 1101, italics added.) In any case, it appears that the trial court gave consideration to the factors that the *LaMusga* court mentioned, and still determined that allowing the children to move with Ana to Mexico would be in their best interests.

For example, the trial court considered the distance of the move, noting that the proposed move would involve "something that's three hours flight time," which "the children have previous[ly] done and which would not be unduly burdensome to them." The court considered the children's ages, and noted that they have "generally tolerated

past moves and separation from Father as shown by [Ana's] previous relocation to Mexico and the regular trips."

In reaching its decision, the trial court also noted that "Guadalajara is where both parties met, dated, married, and each has extended family there, with whom the children have visited on a regular and consistent basis," and that Ana's testimony "provided credible evidence that she has a job opportunity with her family (through the family business) and the availability of appropriate housing." Further, the court explained that there had been no credible evidence presented that suggested that Ana's request to relocate "was as a result of any effort to alienate and separate [Jose] from the minor children." In fact, there was testimony that Ana had intended to live in the United States for only a year when she and Jose first moved here, and that she had always wanted to return to Guadalajara to be near her family.

Although the trial court indicated some concern as to whether Ana would sufficiently "support and foster [Jose]'s relationship with the minor children," and whether Ana had "unrealistic" goals and recommendations concerning visitation between Jose and the children if she were permitted to move to Guadalajara with the children, the court found that these concerns were "outweighed by the court's continuing jurisdiction, pursuant to Family Code section 3048, knowing that should [Ana] not fully comply with the court's order, the court would strongly consider a modification of custody to [Jose]."

The trial court found that "the continual relationship of the parents is problematic," in that the parties "clearly bear emotional trauma/scars as a result of various issues including but not limited to [Jose]'s domestic violence and substance abuse." However,

this factor did not weigh in either party's favor, since the court viewed both parties as having failed in this area. The court determined that while it had no credible information regarding "the preference of the children given their young age, . . . it appears that they are more closely bonded to [Ana] as a primary parent."

There is clearly sufficient evidence to support the trial court's findings concerning the best interests of the children. The fact that some of Dr. Heller's observations established that Jose and Ana were relatively equal on a number of dimensions does not mean that the trial court abused its discretion in fashioning its ultimate order and judgment granting Ana's move-away request, in light of the evidence that the children are more closely bonded with Ana than with Jose.

IV

DISPOSITION

The judgment of the trial court is affirmed.

AARON, J.

WE CONCUR:

McINTYRE, Acting P. J.

IRION, J.